

were to undertake to review the interim standard in its entirety, the length of the proceeding and the corresponding burden on the Commission and its staff would multiply exponentially. For reasons stated earlier (see DOJ/FBI Petition ¶¶ 115-118) and addressed further below, it is imperative that the Commission exercise its rulemaking authority under Section 107(b) in an expedited manner. The delay that would result from an open-ended review of the interim standard would be wholly inconsistent with the need for expedition.

III. The Interim Standard Should Not Be "Remanded" to Industry

47. TIA and CTIA propose that the Commission confine itself to identifying any deficiencies in the interim standard, then "remand" to the TIA subcommittee for the development of technical requirements and standards needed to cure any identified deficiencies. TIA Petition at 11-12; CTIA Response at 7-9; see also CDT Petition at 19. As noted above, TIA contemplates that this additional "remand" cycle would delay the implementation of Section 103 of CALEA for at least three years after the conclusion of the Commission's own proceedings. These suggestions are fundamentally misconceived, both legally and practically.

48. As a legal matter, by its terms, CALEA simply does not provide for the Commission to "remand" anything to industry. Section 107(a) of CALEA provides industry a full and fair opportunity to develop its own standards for implementing the assistance capability requirements of Section 103. But if industry's efforts fall short, as the Department of Justice and the FBI believe

to be the case here, Section 107(b) specifically provides for the Commission itself to promulgate, "by rule," "technical requirements or standards."

49. TIA and CTIA are attempting to transform the rulemaking proceeding mandated by Section 107(b) into a proceeding for a declaratory ruling by the Commission. But the Department of Justice and the FBI have not sought a declaratory ruling, and Section 107(b) is not intended to lead to one. If Congress had meant for the Commission to respond to a deficient industry standard merely by issuing a declaratory ruling, rather than by promulgating new technical requirements and standards "by rule," it would have said so. The remand proposals are an unwarranted attempt to displace the mechanism specifically mandated by Congress in Section 107(b).

50. CTIA insists that the Commission "has the authority to remand any changes in the standard to TR45.2 for final implementation, even where Congress empowers the Commission by statute to promulgate rules itself." CTIA Response at 9. But CTIA does not identify any statutory basis in CALEA for this supposed authority, and none exists. CTIA points to the Commission's recent order in the "V-chip" rulemaking proceeding, In the Matter of Technical Requirements To Enable Blocking of Video Programming Based on Program Ratings, ET Docket No. 97-206 (released March 13, 1998). See CTIA Response at 9 n.17. In the V-chip proceeding, however, the Commission did not "remand" anything; it simply adopted an existing industry technical standard that it determined to be satisfactory. Here, in contrast, CTIA and TIA are proposing that even if the industry standard is not adequate, the Commission should remand to the very industry body that produced the inadequate standard in the first place. In the V-chip proceeding, moreover, Congress merely called

on the Commission to engage in "oversight" and "supervision" of industry's adoption of technical standards and specifications. 47 § U.S.C. 330(c)(3). Here, in contrast, Section 107(b) of CALEA provides for the Commission itself to establish supervening technical requirements and standards when it finds industry's standards inadequate.

51. As a practical matter, a remand to the TIA subcommittee would result in substantial additional delay in the implementation of CALEA's assistance capability requirements. TIA's proposed remand schedule, under which the subcommittee would not even issue its revised standards for a full year after the remand, graphically illustrates the potential for delay. And if the revised standards were themselves not satisfactory, law enforcement presumably would have to return to the Commission for further relief, which would compound the delay. Law enforcement's ability to carry out lawful electronic surveillance in an effective manner has already been eroded by technological changes in the telecommunications industry, and in the absence of technical requirements and standards that give full effect to Section 103(a) of CALEA, the erosion grows greater with each passing day. A "remand" scheme that would gratuitously delay the promulgation of adequate standards is antithetical to Congress's underlying goal of preserving law enforcement's electronic surveillance capabilities in the face of technological change.

52. We are confident (as Congress itself obviously was) that the Commission has the technical expertise required to identify and prescribe appropriate technical requirements and standards under Section 107(b). The government's proposed rule (DOJ/FBI Petition, Appendix 1) sets forth the needed modifications to the interim standard in sufficient technical detail. The provisions of the

proposed rule are technically straightforward, and the Commission and its staff will have ample opportunity to evaluate those provisions (and, if necessary, refine them) during the course of this rulemaking proceeding.

IV. The Government's Proposed Rule, Not the Interim Standard, Should Provide the Basis for the Commission's Notice of Proposed Rulemaking

53. As of June 5, 1998, the Commission will have received a full round of public comments and replies regarding the rulemaking petitions now before the Commission. Thereafter, the next step will be for the Commission to issue a Notice of Proposed Rulemaking (NPRM) setting forth the "technical requirements and standards" that the Commission proposes to adopt under Section 107(b). See 47 C.F.R. § 1.407. For the reasons given in the government's rulemaking petition, the Department of Justice and the FBI urge the Commission to use the government's proposed rule as the basis for the NPRM.

54. One alternative that has been raised is the possibility of using the interim standard itself as the proposed rule for purposes of the NPRM. In our view, such an approach would be extremely ill-advised, both legally and practically.

55. As a legal matter, the purpose of an NPRM is to solicit public comment on the rule that the Commission actually proposes to adopt. Unless the Commission comes to the preliminary conclusion that the interim standard is not deficient in any of the respects identified by the Department of Justice and the FBI, the interim standard therefore cannot be put forward as the

Commission's proposed standard. (Indeed, if the Commission were to conclude that the interim standard is not deficient, the appropriate disposition would not be to promulgate a rule adopting the interim standard, but rather to deny the pending rulemaking petitions and close the rulemaking proceeding without issuing a rule.)

56. As a practical matter, making the interim standard the basis for the NPRM would severely undermine the value of this rulemaking proceeding to the Commission and the participants. Doing so would be likely to lead to a round of public comments and replies that will largely replicate the current round of comments on the rulemaking petitions. In contrast, using the government's proposed rule (or whatever other standards the Commission preliminarily concludes are warranted under Section 107(b)) will focus the next round of comments and replies more precisely on the Commission's intended course of action and will thereby contribute much more effectively to the Commission's ultimate deliberations. It will also further diminish the asserted need for "remanding" this proceeding to industry for further development of technical requirements and standards.⁸

⁸ Using CDT's petition as the basis for the Commission's NPRM would be even more ill-advised than using TIA's interim standard. For the reasons indicated above, CDT's objections to the interim standard are without merit, and they have been rejected not only by law enforcement but by industry as well. The Commission can readily seek public comments on CDT's objections without predicated the NPRM on those objections.

DATE: May 20, 1998

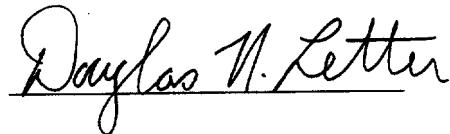
Respectfully submitted,

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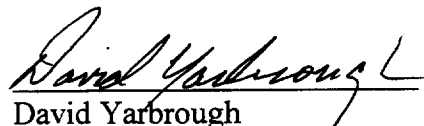
In the Matter of:)

Communications Assistance for Law)
Enforcement Act)
_____)

CC Docket No. 97-213

I, David Yarbrough, a Supervisory Special Agent in the office of the Federal Bureau of Investigation (FBI), Washington, D.C., hereby certify that, on May 20, 1998, I caused to be served, by first-class mail, postage prepaid (or by hand where noted) copies of the above-referenced Comments Regarding Standards For Assistance Capability Requirements, the original of which is filed herewith and upon the parties identified on the attached service list.

DATED at Washington, D.C. this 20th day of May, 1998.


David Yarbrough

**In the Matter of:
Communications Assistance for Law Enforcement Act**

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